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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

**In re WALTER M. III, a Person Coming
Under the Juvenile Court Law.**

**SOLANO COUNTY HEALTH AND
SOCIAL SERVICES DEPARTMENT,**

Plaintiff and Respondent,

v.

WALTER M., JR.,

Defendant and Appellant.

A132343

**(Solano County
Super. Ct. No. J39819)**

Walter M., Jr., appeals from an order issued after a hearing pursuant to Welfare and Institutions Code section 366.26. He contends the court erred in terminating his parental rights, because it did not apply the parent-child relationship exception in Welfare and Institutions Code section 366.26, subdivision (c)(1). We will affirm the order.

I. FACTS AND PROCEDURAL HISTORY

Appellant Walter M., Jr. (appellant) is the father of the minor, Walter M. III (Walter). Walter's mother is Crystal J. (Crystal). Walter was born in January 2008.

In November 2009, respondent (Agency) filed a juvenile dependency petition regarding Walter, then 22 months old, pursuant to Welfare and Institutions Code

section 300, subdivisions (b), (g), and (j).¹ The Agency alleged that Walter lived with appellant and appellant's girlfriend in an unsafe and unsanitary room, appellant abused controlled substances to the extent he was periodically incapable of providing appropriate care and supervision, appellant kept knives and drug paraphernalia within Walter's reach, and appellant let his girlfriend panhandle with Walter in cold rainy weather. The Agency further alleged that Crystal was incarcerated, had a chronic history of substance abuse, and had prior substantiated child welfare referrals with respect to two of her other children.

According to the Agency's detention report, Walter's maternal grandmother had heard that appellant's girlfriend was a prostitute, appellant was her pimp, and both used drugs. A police check on appellant's residence – a room in a Vallejo motel – determined that the room reeked of urine and feces, and the floor and bed were covered with half-eaten food, chicken bones, beer cans, and other garbage. A pornographic DVD was playing on one of the televisions. A play pen was stacked with dirty clothes, leaving no place for Walter to sleep or play. A crack pipe and crack cocaine residue was found on the nightstand, and knives were found within Walter's reach. The toilet was broken and filled with waste. There was no suitable food for Walter to eat. Appellant's own sister noted that Walter – at this point less than two years old – frequently blurted out curse words like “fuck” and “bitch.”

At the detention hearing, the court ordered that Walter be detained based on a finding of substantial danger to his physical health if he were not removed. Both appellant and Crystal were ordered to undergo substance abuse testing and receive monitored visitation with Walter.

A. Jurisdictional Hearing

At a contested jurisdictional hearing on January 8, 2010, the juvenile court granted appellant presumed father status and sustained the dependency petition as to allegations under section 300, subdivisions (b) and (j).

¹ Except where otherwise indicated, all statutory references herein are to the Welfare and Institutions Code.

B. Disposition Report and Hearing

According to the Agency's disposition report of February 16, 2010, Walter was living in foster care and had supervised visits with appellant. During one of the visits, appellant took several phone calls. He repeatedly requested that his girlfriend attend visitation with him or instead of him, claiming she was Walter's primary caretaker. Appellant asserted he had appropriate housing, was able to care for Walter, and wanted Walter returned. He claimed that the police had fabricated the evidence against him and that the filthy motel room they inspected (and photographed) was not his.

The Agency recommended that Walter be declared a dependent and that appellant be provided reunification services.

At a contested disposition hearing on February 18, 2010, the juvenile court found clear and convincing evidence of substantial danger to Walter's physical health, safety, protection or physical or emotional well-being if he were returned to appellant, and that there were no reasonable means by which Walter's physical health could be protected without removing him from parental custody. The court ordered that appellant receive reunification services and have weekly supervised visitation with Walter.

C. ICWA Compliance

Appellant claimed Native American heritage through the Blackfeet and Cherokee Tribes. The Agency mailed notice to the tribes and the Bureau of Indian Affairs pursuant to the Indian Child Welfare Act, 25 U.S.C. section 1901 et seq. (ICWA).

On May 5, 2010, the Agency reported that the tribes who had responded all indicated that Walter was not a member of the tribe or eligible for membership. The remaining tribes did not respond during the dependency proceedings. No ICWA issue is raised in this appeal.

D. Six-Month Review Report and Hearing

In its report for the six-month review hearing, the Agency advised that appellant had "engaged in services," tested negative for drugs, and visited Walter at least weekly. The Agency asserted that Walter appeared to have a "strong connection with his 'daddy'." During the visits, appellant brought snacks and played with Walter, and the

two “interact[ed] well with each other.” At one visit, appellant was “very affectionate and loving towards” Walter but, when Walter had a tantrum, appellant did not address the issue promptly and instead waited for the foster mother to handle it.

The Agency observed that appellant had made minimal progress, and he still lacked stable housing and needed to obtain skills to deal with Walter’s behavior. He was also not “forthcoming” about his relationship with his girlfriend, and he needed more services to successfully reunify with Walter. The risk of returning Walter to appellant’s care was reduced from “very high” to “high.” The Agency recommended that appellant be provided an additional period of reunification services.

At the six-month review hearing in August 2010, the juvenile court found that appellant had made minimal progress in alleviating or mitigating the causes of Walter’s dependency. The court ordered additional reunification services, continued visitation, and found that the ICWA did not apply.

E. 12-Month Review Report and Hearing

In the Agency’s report of December 16, 2010, the Agency advised that appellant was not in compliance with his case plan in regard to finding suitable housing and submitting to substance abuse testing, and he was only in partial compliance as to maintaining a relationship with Walter. Appellant had cancelled a home assessment of his motel room, submitted to only one drug test, failed to attend his appointment for an orientation for substance abuse services, and was in denial of his substance abuse problems. He had not progressed to the point where he could safely and consistently parent Walter. His girlfriend failed to submit to a background check. Appellant visited Walter 16 times out of 23 scheduled visits between May 2010 and October 2010. His parenting skills remained at a minimal level, and the social worker noted his inability to “focus[] and interact[] appropriately” with Walter. During the visits, appellant talked and yelled on his cell phone and required redirection to interact with Walter.

In an addendum report dated January 10, 2011, the Agency advised that a home assessment on January 3, 2011, concluded that his residence was “filthy,” the kitchen

faucet did not work, and there were hazards for a young child. Appellant claimed he worked as a maintenance worker at his apartment complex.

Meanwhile, Walter remained with his foster family and was in good health and developmentally on target. His therapist reported that his aggressive behaviors had improved significantly due to the foster mother's implementation of his suggestions to assist Walter in expressing his feelings. The therapist also observed that Walter had a strong relationship with his foster mother and would have a great deal of difficulty if he were separated from her.

The Agency recommended that the juvenile court terminate reunification services and set a section 366.26 hearing.

At the contested 12-month review hearing on January 11, 2010, the juvenile court terminated appellant's reunification services, finding he had made minimal progress toward alleviating or mitigating the causes necessitating foster placement. The court found that the Agency offered reasonable services to appellant, but the return of Walter to appellant's custody would create a substantial risk of detriment to Walter's safety, protection, or physical or emotional well-being. The matter was set for a section 366.26 hearing.

Walter filed a writ petition seeking relief from the court's order. We denied the petition (appeal number A130954).

F. Section 366.26 Report and Hearing

In its report of May 2, 2011, the Agency advised that Walter remained in foster care and the foster parent was willing to adopt him. A permanency team determined that the best permanent plan for Walter would be adoption by his foster mother.

As to the relationship between Walter and appellant, the Agency reported that appellant missed 10 out of 26 offered visits between May 2010 and October 2010. From January through March 2011, appellant missed all 12 of the visits he was offered, later claiming to a social worker that he was unaware he still had visitation rights once services were terminated. Appellant started to visit Walter again in April 2011 at the Agency's prompting, but appellant's failure to show up for the prior visits had affected

Walter, as he hesitated entering the room for the visit on April 14, 2011. During the visit, there were problems with appellant's conduct. Appellant interacted with Walter only for a short time, choosing instead to stand back and watch Walter play with toys or the other dependent children for most of the visit. When Walter began to climb onto a table, appellant did not immediately intervene. Twice during the visit, appellant talked on his cell phone. At the end of the visit, appellant kissed Walter and told him he would see him the following week, but Walter "just responded with OK" and was ready to leave the room with his foster mother.

The Agency observed that Walter had been a dependent child for much of his life due to his parents' history of substance abuse and appellant's inability to comply with his case plan as to his drug use, housing, and relationship with Walter.

On the other hand, Walter had been living in a stable and nurturing foster home for about a year and a half preceding the section 366.26 hearing. His foster mother provided a stable, safe and healthy environment. She considered Walter her son and wanted to adopt him. The social worker observed Walter interact with the foster mother and her other foster child on several occasions, noting that Walter appeared comfortable around the foster mother and called her "mommy." The foster mother and Walter played together and were affectionate towards each other, exchanging kisses and hugs. Walter called the other foster child "brother," played with him, shared his toys, hugged him and followed him around the home. The social worker opined that Walter had bonded with both the foster mother and the other foster child.

The Agency concluded that the benefits of continuing the relationship with appellant did not outweigh the benefits of stability and permanency that would come from placing Walter in an adoptive home. The Agency recommended that the court terminate parental rights and identify adoption as Walter's permanent plan.

The contested section 366.26 hearing was held on June 8, 2011. The court reviewed and considered the Agency's reports of May 2, 2011, January 10, 2011, and December 16, 2010. The only testifying witness was social worker Maurice Shaw.

Shaw testified that the Agency had concluded Walter was generally adoptable due to his young age and good health and was specifically adoptable because his foster mother expressed her intent to adopt him.

Shaw further testified that Walter recognized appellant as his father and that prior social workers had noted they had a close relationship. However, appellant had to be redirected to play with Walter when he tried to converse with social workers or talk on his cell phone. During a visit that Shaw observed, Walter entered the visitation room hesitantly, and Walter seemed more interested in playing with toys than in interacting with appellant. Appellant used his cell phone twice during the visit.

On cross-examination, Shaw acknowledged that Walter asked about appellant after appellant failed to show up for his visits. On redirect, Shaw explained that upon receiving an explanation and being comforted by his foster mother, Walter immediately resumed playing with the other foster child. In addition, Shaw noted, Walter did not become upset or cry at the conclusion of visits with appellant, but rather walked directly to the van with his foster mother. Nor did Walter have problems transitioning back into the foster home after visits.

Shaw also testified that Walter has a very positive and close relationship with his foster mother, whom he calls “mommy.” When Shaw visited Walter in the home, he observed Walter seek her attention, try to climb onto her lap, and give her kisses and hugs. In Shaw’s view, Walter saw his foster mother as his “home base,” such that he could explore and then return to the comfort she provided.

Shaw recommended the termination of appellant’s parental rights. In his opinion, appellant was not stable enough to have Walter in his care, and the benefits of continuing the relationship did not outweigh the permanency that adoption could provide to Walter.

Appellant attended the section 366.26 hearing and took the witness stand, but only to confirm his attorney’s offer of proof that, if appellant were to testify, he would testify that he had a bond with Walter.

Both county counsel and the attorney for the minor argued that Walter was adoptable, there was no showing of any exception to the rule authorizing adoption as the

permanent plan (§ 366.26, subd. (c)(1)), and appellant's parental rights should be terminated. Appellant's attorney argued that the exception based on the parent's relationship to the child applied, in that Walter would benefit from a continuing relationship with appellant. (§ 366.26, subd. (c)(1)(B)(i).)

The juvenile court found by clear and convincing evidence that Walter was adoptable, and further found that no statutory exception to adoption applied. The court terminated appellant's parental rights (and the parental rights of the mother) and identified adoption as Walter's permanent plan. The court found that appellant had a strong connection to Walter and that Walter had some connection with appellant, but termination of appellant's parental rights would not be detrimental to Walter.

This appeal followed.

II. DISCUSSION

Where, as here, family reunification services have been terminated, section 366.26, subdivision (c)(1) requires the juvenile court to terminate parental rights and order adoption upon a determination by clear and convincing evidence that the child is likely to be adopted. An exception exists if, inter alia, a parent has "maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (§ 366.26, subd. (c)(1)(B)(i), formerly subd. (c)(1)(A) (Stats. 2007, ch. 583, § 28.5).)

In the matter before us, there is no dispute that family reunification services have been terminated and there was clear and convincing evidence of Walter's adoptability. The sole question on appeal is whether the exception under section 366.26, subdivision (c)(1)(B)(i) was established.

To establish the exception, appellant had to prove: (1) he occupied a parental role in Walter's life resulting in a significant, positive, emotional attachment, and regular visits and contact have continued or developed the attachment; and (2) "the relationship promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575; see *In re Elizabeth M.* (1997) 52 Cal.App.4th 318, 324.)

As to the latter requirement, “the court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer.” (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.)

Critical at this juncture are the child’s best interests and the goals of stability and continuity for the child. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317; see generally *In re Baby Boy L.* (1994) 24 Cal.App.4th 596, 609-610; *In re Marilyn H.* (1993) 5 Cal.4th 295, 305-309.) Thus, parental rights should not be terminated if it would deprive a child of substantial, positive emotional attachment such that the child would be greatly harmed. (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) On the other hand, to establish the exception, the parent must do more than show that his or her contacts with the child were frequent and loving, or that the parent and child share an emotional bond. (*In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1418; *In re Derek W.* (1999) 73 Cal.App.4th 823, 827; *In re Elizabeth M.*, *supra*, 52 Cal.App.4th at p. 324.)

We will review for substantial evidence. (*In re S.B.* (2008) 164 Cal.App.4th 289, 297-298; accord *In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351.) We would reach the same conclusion under the abuse of discretion standard.

In the matter before us, there was little evidence that appellant had any parental role or other relationship that resulted in a significant positive and emotional attachment. Walter lived with appellant from his birth in January 2008 until November 2008 (when he lived with Crystal and his maternal grandmother), and again from August 2009 until his detention in November 2009: in other words, for about half of his 22 months up to November 2009. From that point on, including approximately 19 months that passed until the court’s section 366.26 order, Walter did not live with appellant at all. Although appellant at times visited Walter on a weekly basis, he missed 10 of 26 visits between May 2010 and October 2010 and missed all 12 visits offered between January 2011 and March 2011.

Appellant argues that back in August 2010 the Agency had reported that Walter and appellant enjoyed their visits and had a strong connection, and at the section 366.26

hearing the social worker testified that appellant and Walter shared a “close relationship” and between visits Walter would ask when he could see appellant again. On the other hand, after appellant missed so many visits between October 2010 and March 2011, Walter hesitated before entering the visitation room and responded unenthusiastically when appellant said they would see each other the following week. Walter seemed more intent on playing with toys than interacting with appellant. Although appellant did not need to prove Walter has a primary attachment to appellant or that appellant and Walter have day-to-day contact, appellant did have to prove that Walter had a “substantial, positive emotional attachment” to appellant. (*In re S.B.*, *supra*, 164 Cal.App.4th at p. 299.)

In any event, appellant had to show not only that his contacts with Walter were frequent and loving, and that they share an emotional bond, but also that Walter would suffer *great harm* if the relationship were terminated, to the extent that maintaining the relationship outweighs the well-being Walter would gain from an adoptive placement with his foster family. (E.g., *In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575; *In re Derek W.*, *supra*, 73 Cal.App.4th at p. 827.) In this regard, the juvenile court found that, even though appellant had a strong connection to Walter and Walter had some connection to appellant, the termination of appellant’s parental rights would not be detrimental to Walter.

Substantial evidence supported the juvenile court’s finding that Walter would not suffer detriment if his relationship with appellant were severed. There was no direct evidence that Walter would suffer great harm if his relationship with appellant was terminated. To the contrary, while Walter would ask when he would see appellant again between visits, the comfort of his mother seemed to assuage his concern. He did not become upset when the visits with appellant ended, and he had no difficulty transitioning from those visits back to the care of his foster mother.

As a result, while we do not simply compare the home that appellant could provide with the home provided by the prospective adoptive family, we do find substantial evidence that the quality of Walter’s relationship with appellant does not

outweigh the benefit Walter will obtain from adoption. Walter is stable in his prospective adoptive home, he has bonded with his foster family, he readily exchanges affection with his foster mother, and he tends to get upset when he is separated from her. Substantial evidence supported the conclusion that the parental bond exception does not apply.

The cases on which appellant relies are readily distinguishable. In *In re S.B.*, *supra*, 164 Cal.App.4th 289, the juvenile court erred in finding that the exception did not apply, where the father had been the child's primary caregiver for three years, the father maintained frequent and loving visits that maintained their attachment, the father complied with his case plan in every respect, the child was unhappy when the visits were over, the child expressed his desire to live with the father, and the court had found that they shared an "emotionally significant relationship." (*Id.* at pp. 298-301.) Those circumstances, however, are not present in the matter before us.

In *In re Jerome D.* (2000) 84 Cal.App.4th 1200, the evidence was insufficient to support the finding that the parent did not show a beneficial relationship precluding termination of parental rights, where the child had lived with the parent for over six years, the child expressed a desire to live with the parent again, they had progressed to unsupervised overnight visits, and a psychologist testified that continued contact would benefit the child and the child could suffer emotional and behavioral difficulties if the relationship were severed. (*Id.* at pp. 1207-1208.) Again, none of those circumstances is present in the matter at hand.

In *In re Brandon C.* (1999) 71 Cal.App.4th 1530, substantial evidence supported the juvenile court's conclusion that the termination of parental rights would be detrimental to the children, where the mother had visited the children consistently, to the extent allowed, for the entire three years of the dependency case, and one of the children cried for long periods of time and resisted going to bed after her visits. (*Id.* at pp. 1535-1537.) However, the fact that those circumstances constituted substantial evidence *supporting* the court's finding in that case does not mean that those circumstances would necessarily compel us to conclude there was *no* substantial evidence to support a contrary

juvenile court finding like the one in this case. In any event, the circumstances in *Brandon C.* are not present in the matter before us.

In contrast to the cases on which appellant relies, appellant did not have a strong pre-existing bond with Walter from years as a caregiver, he did not display appropriate parenting during visits, he had not progressed to unsupervised overnight visits, and Walter did not express any significant reaction when his visits concluded.

Appellant's other arguments are unavailing as well. He argues, for example, that the fact Walter did not get upset at the conclusion of the visits should not be considered a sign that the parental bond is weak. His argument seems inconsistent with his reliance on *In re S.B.* and *In re Brandon C.*, since those cases identified the child's unhappiness upon leaving visits as a factor in their analysis. At any rate, it is not our role to choose between conflicting inferences that might arise from facts such as Walter's passivity upon leaving his visits with appellant; we review only for substantial evidence – credible evidence from which a reasonable trier of fact could conclude in the manner of the juvenile court. For the reasons stated *ante*, the fact that Walter did not become upset when his visits with appellant were over, together with the other circumstances in the case, constitutes such substantial evidence.

Appellant further argues that Walter's bond to his foster family is irrelevant, because the fact that he shares a positive and significant relationship with his foster mother does not diminish the harm he will experience from the loss of a relationship with appellant. (See *In re S.B.*, *supra*, 164 Cal.App.4th at pp. 299-300.) Walter's bond with his foster mother does, however, reflect part of the benefit Walter will receive from the stability and permanency of adoption into the foster family. Thus, substantial evidence supports not only the conclusion that Walter would not suffer substantial harm if his relationship with appellant were terminated, but also the conclusion that continuation of the relationship would not outweigh the benefit of the stability and permanency of adoption.

Appellant has failed to demonstrate error.

III. DISPOSITION

The order is affirmed.

NEEDHAM, J.

We concur.

SIMONS, Acting P. J.

BRUINIERS, J.